

MALAYSIAN REPORTS**LEE WAH BANK LTD. v.
NG KIM LEK & ORS.**

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman and
Chang Min Tat F.J.) March 23 and August 30, 1978]
[Kuala Lumpur — Federal Court Civil Appeal No. 137 of 1976]

Banking — Dishonour of cheque — Libel — Overdraft account — Whether dishonour in excess of agreed limit of overdraft — Whether evidence admissible to show that limit of \$100,000 in bill of sale was made of overdraft limit of \$80,000 and a further facility of \$20,000 for letters of credit — Whether reasonable notice should have been given — Evidence Act, 1950, s. 92.

Torts — Libel — Dishonour of cheque.

Evidence — Admission of evidence to vary written contract — Evidence Act, 1950, s. 92.

The respondents had applied for an overdraft and in their letter of application they asked for an overdraft of \$80,000 and in addition letters of credit permitting drawings against 60 days' sight not exceeding \$20,000 making total facilities of \$100,000. Subsequently two charges and a bill of sale were executed by the respondents for securing the repayment of the sum of \$100,000. Under the Bill of Sale and the charges the loans were on demand and it was provided that it was not obligatory for the Bank to make any advances to the Borrowers should the Bank in its absolute discretion deem it inadvisable so to do. The respondents utilised the overdraft accounts but their operation was unsatisfactory. The bank started to dishonour the cheques of the respondents after the overdraft stood in excess of \$80,000. There was correspondence between the parties in which reference was made to the reduction of the overdraft of \$80,000. The respondents brought an action for libel against the appellant for dishonouring their cheques. The learned trial judge held that the application for the loan and the correspondence between the parties were inadmissible to construe the Bill of Sale and the charges and he therefore found that the limit of the overdraft was \$100,000. He gave judgment for the respondents and awarded damages of \$30,000. The appellant appealed.

Held, allowing the appeal: (1) the evidence of the application and the correspondence and oral testimony was admissible to show that the limit of \$100,000 in the Bill of Sale and the charges was in fact and in law made up of an overdraft limit of \$80,000 and a further facility of \$20,000 for letters of credit on 60 days' sight;

(2) such evidence when admitted established that the limit of the overdraft was \$80,000;

(3) even if notice of dishonour of cheques drawn over the approved or agreed limits was required in law or in equity, it was dispensed with in this case by the clause enabling the Bank contractually to refuse, in its absolute discretion, any request for advances.

Case referred to:-

- (1) *Oriental Bank of Malaya Ltd. v. N. Subramaniam* [1958] M.L.J. 35.

FEDERAL COURT.

P.P. Royan for the appellants.

N. Ramachandran for the respondents.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): For dishonouring the cheques of the respondents (their erstwhile customer), the Bank had to meet a case of libel. It failed to meet it and had damages in the sum of \$30,000 awarded against it. It said however that the dishonour conveyed by the return of the relevant cheques endorsed with the advice "Refer to Drawer" was because the amounts drawn on those cheques were in excess of the overdraft facilities granted to its customers. It could not see how the customers had been libelled.

A It is settled law that if the dishonour was without reason, the customer had been libelled and was entitled to damages. The question before the court then was whether the relevant dishonour was in excess of the agreed limit of the overdraft.

The overdraft was applied for in writing by the respondents. In their letter of application, they asked for certain facilities spelled out to be:

- B** "1. An overdraft of \$80,000 and in addition Letter of Credits (sic) permitting drawings against 60 days' sight of amounts not exceeding \$20,000 making total facilities of \$100,000.
2. Should the occasion arise we would however make further application for additional Letter of Credits."

There appeared to be no specific answer of the Bank to this request but after its several demands for particulars of the respondents' assets had been answered in writing, two charges and a bill of sale were executed. They were for the securing of the repayment of the sum of \$100,000 to the Bank, which was the total of the overdraft of \$80,000 asked for and the facility for Letters of Credit.

D On January 22, 1968, the respondents executed a Bill of Sale charging their movable assets set out in the Schedule,

"... for the purpose of securing the payment to the Bank by the Borrowers on demand the balance from time to time due to the Bank on the current or continuing account or accounts or any other account or accounts of the Borrowers with the Bank and owing in respect of cheques bills notes drafts drawn accepted or indorsed by the Borrowers either alone or jointly with another or others (including all moneys which may become owing in respect of any notes bills or drafts drawn accepted or indorsed by the Borrowers either solely or jointly with another or others which may not at the time of closing the said account or accounts have become due or payable but which for the time being have been entered in the said account or accounts) or in respect of cheques bills notes or drafts accepted paid or discounted on behalf of the Borrowers either alone or jointly with another or others or for loans or advances made to or for the use or accommodation of the Borrowers whether alone or jointly with another or others in respect of contracts for the forward delivery of goods bills or specie or otherwise howsoever up to the limit of dollars One hundred thousand only (\$100,000) for principal and for interest at the rate of 10.8 per centum per annum with monthly rests commission and other usual bankers' charges, such sum to be raised and paid at the times and in manner following, that is to say, immediately upon the receipt by the Bank of a notice in writing sent by the Bank in manner hereinafter provided."

H The next day Ng Kim Lek one of the partners in the respondent firm executed a charge on a piece of land owned by him for a similar purpose. Another piece of land was charged to the Bank for the same purpose by Chuah Poh Geok (m.w.) as guarantor. The words used in all three instruments were, for all practical purposes, similar.

For the Bill of Sale and in both Charges, apart from the provision that the loans were callable on demand, there was this common provision that

I "Nothing in these presents contained shall be deemed to render it obligatory for the Bank either at law or in equity to make or continue to make any advances to the Borrowers should the Bank in its absolute discretion deem it inadvisable so to do without assigning any reason therefor."

In the course of their business the respondents utilised the overdraft facilities but did not at any time exceed the sum of \$85,000, which must include the interests, accumulated as well as current charged on

the borrowings. Their operation of their account was clearly unsatisfactory. The Bank started to dishonour their cheques from January 18, 1971. They were all dishonoured when the overdraft stood in excess of \$80,000. From this date until September 8, 1971, some 117 of the respondents' cheques were dishonoured. Up to this time, the respondents did not feel themselves libelled by the consistent dishonour of their cheques. If they were, they did not show any visible sign. Then when the Bank on October 21, 1971, finally demanded payment of the sum of \$81,630.45 for the overdraft and interest, they consulted their solicitors who first replied on November 1, 1971, claiming, *inter alia*, that the Bill of Sale was bad in law.

But before this stage was reached, attempts had been made by both sides to reduce the amount of the overdraft. As far back as May 23, 1968 the respondents enquired as to the amount necessary to pay in for the release of the two pieces of land charged, and obtained an answer that upon the payment of \$55,000 the properties would be released and the amount of the overdraft reduced from \$80,000 to \$20,000. Subsequently on the further representations of the respondents, the amounts were altered to \$50,000 and \$30,000 respectively. The Bank at the same time demanded the repayment of the overdraft by monthly payments in of \$1,000. The respondents asked for this sum to be reduced to \$500. In the whole of this correspondence, it is clear that in the knowledge of the respondents, the upper limit of the overdraft facilities granted to them was \$80,000, the sum which they requested in their first application.

At the trial, the oral evidence followed its predictable course, each side claiming to represent the truth. The learned trial judge alluded to this evidence in some detail but came to no definite findings on it. He held, however, that the correspondence between the parties was inadmissible to construe the Bill of Sale and the Charges and he therefore found that the limit of the overdraft was \$100,000.

"On the evidence before me I came to the conclusion that in so far as the overdraft facilities were concerned the defendants had committed a breach of their contract with the plaintiffs as embodied in the bill of sale and the charge. I agreed with Mr. Ramachandran that the agreements which had to be considered in this case were the bill of sale and the charge which had set out the terms of the overdraft facilities granted by the defendants to the plaintiffs and that the subsequent correspondence between the parties did not have the effect of varying or altering the terms of the original agreement between the parties. In my view the subsequent correspondence which referred to the overdraft amount as \$80,000 and not \$100,000 was insufficient evidence to establish that there had been a subsequent variation of the original contract. Moreover provisoes (b) and (c) of section 92 of the Evidence Act referred to by Mr. Abraham can hardly have any application in the present case because as can be seen from section 92 the provisions with regard to the varying or altering of an agreement refers only to any subsequent oral agreement or statement and not to any written statement. I held therefore that in deciding this case on the question of breach of contract the only documents which the court could look into were the bill of sale and the charge wherein the overdraft facilities are stated to be to the limit of \$100,000. The original application dated September 22, 1967 for overdraft facilities did refer to the limit of \$80,000 as overdraft facilities and \$20,000 for letters of credit but the fact remains that when the final agreement was drawn up there was only one figure of \$100,000. Therefore in my view whatever the

A parties might have discussed earlier it did not have the effect of varying the final figure of \$100,000 as embodied in the bill of sale and the charge."

This was clearly a finding of a fact based on the application of a particular section of the Evidence Act.

B Section 92, of course, applies where upon the face of it, the written instrument appears to contain the whole of the terms of the contract. But where it appears that it does not contain the whole agreement between the parties and that there are certain other oral conditions which are not inconsistent with the written instrument and which would make up the whole contract, oral evidence is admissible to prove those other conditions.

C The question in this case is whether the evidence of the application of the respondents for an overdraft limit of \$80,000 and a further facility of \$20,000 for Letters of Credit on 60 days' sight and of the correspondence and the oral testimony is admissible to show that the limit of \$100,000 in the Bill of Sale and the Charges is in fact and in law made up of those two amounts. In our view and with respect, the evidence is admissible. It is not inconsistent with the written instruments. It serves to explain that the sum of \$100,000 secured in those instruments was to be made up of two sums: \$80,000 on the overdraft and \$20,000 on Letters of Credit. It is evidence admissible under proviso (f) to section 92 Evidence Act, to show in what manner the language of a document is related to existing facts. It is admissible evidence, being confined strictly to surrounding facts so intimately connected with the instruments that they afford reliable material for ascertaining the nature and extent of the subject-matter referred to: see, also, *Oriental Bank of Malaya Ltd. v. N. Subramaniam*.⁽¹⁾ The sum of \$100,000 is, in our view, a latent ambiguity in the circumstances which requires extrinsic evidence to identify its exact application.

The admissible evidence must necessarily establish that the limit of the overdraft was \$80,000.

G But that is, in the submission of learned counsel for the respondents, not the end of the matter; even if the limit was \$80,000 and not \$100,000, the respondents were entitled to reasonable notice. This submission is only correct if the conduct of the Bank had been such as to amount to waiver of the limit or such as to encourage the respondents to think that cheques drawn over and above the limit would be met. The contention of the respondents was not based on the alternative claim that if the limit was the lower figure, they were entitled to notice. On the other hand, there was evidence from Yeung Kwok Leung DW2, who was at the relevant times the Bank Manager, that whenever a cheque was drawn over the limit, one or the other of the partners of the respondent firm would seek his approval on the undertaking that that particular cheque would be met in a few days. It is evidence which anyone dealing with a Bank and on the presumption that a Bank would act reasonably to protect its own interest, would know to be reasonable and true. It is borne out by the statement of the respondents' monthly accounts. The fact that the amounts stayed just above \$80,000 and would incor-

porate accumulated and capitalised interests must bear out the evidence of the Manager. In any event, notice of dishonour of cheques drawn over the approved or agreed limits, if there is such a requirement in law or equity in the circumstances, is dispensed with by the clause above referred to, enabling the Bank contractually to refuse, in its absolute discretion, any request for advances.

We therefore allow the appeal with costs here and in the court below.

Appeal allowed.

Solicitors: *Shook Lin & Bok; N. Ramachandran & Co.*

**BANK BUMIPUTRA MALAYSIA BHD. v.
MAJLIS AMANAH RA'AYAT**

[F.C. (Raja Azlan Shah Ag. C.J. (Malaya), Wan Suleiman and Chang Min Tat F.J.J.) May 30 and August 30, 1978]
[Kuala Lumpur — Federal Court Civil Appeal No. 215 of 1977]

Practice and Procedure — Application to set aside judgment in default — Reasons for not defending — Merits of defence — R.S.C., 1957, O. 13 r. 11.

Contract — Guarantee — Limitation of time for demand under guarantee — Whether valid — Contracts Act, 1950, s. 29.

The appellants claimed a sum of \$73,402.80 being the amount allegedly owed by Syarikat Baiduri (M) Sdn. Bhd. on an overdraft account. The respondents were sued as the guarantors of the company. Judgment in default was obtained by the appellants and the respondents applied that the judgment be set aside. The respondents tried to explain why the action was not defended and also alleged that they had a good defence to the action. The application was allowed in the High Court and the appellants appealed to the Federal Court.

Held: (1) an appellate court could only interfere in this case with the exercise of the discretion if the court below had clearly acted on some wrong principle, committed some error of law or failed to consider matters which demanded consideration;

(2) in dealing with the application the learned judge committed no error of law. Neither did he fail to consider all matters demanding consideration nor act on any wrong principle;

(3) all the elements were present which would justify the exercise of the discretion in favour of the respondents.

FEDERAL COURT.

Miss Swee Chew Yoke for the appellants.

Mohamed Ismail (S.P. Woo with him) for the respondents.

Cur. Adv. Vult.

Raja Azlan Shah Ag. C.J. (Malaya) (delivering the judgment of the Court): This was an appeal from an order of the High Court at Kuala Lumpur allowing the application by the respondents, as the second defendants in the action, that the judgment entered against them in default of appearance be set aside. We dismissed the appeal on May 30, 1978.

The appellants claimed a sum of \$73,402.80 being the amount alleged to be owing by the first defendants, Syarikat Baiduri (M) Sdn. Bhd., on an overdraft account. The respondents were sued as guarantors for the first defendants. The specially endorsed writ was

A filed on March 16, 1976 and served on the respondents on March 31, 1976. On June 23, 1976, the appellants obtained judgment against the respondents in default of appearance.

The application to set aside the judgment was made by summons-in-chambers dated October 18, 1977. One ground stated in the affidavit in support of the application is that at the time when the writ was served the respondents were engaged in major administrative reorganisation, and from March 22, 1976 till the end of June 1976 they were busy transferring files and personnel from the Contracts Unit to the newly set up Overdraft Unit of the Loans Division and in the process this matter lost the attention which otherwise would have been given. Another ground is that the writ when served, was handed to an officer who was no longer with the relevant division and he had failed to forward it to the appropriate officer. All of these alleged facts were not refuted by the appellants. As to the merits of defence the respondents relied on Clause 13 of the guarantee agreement executed by them on January 11, 1974, which reads as follows:—

D "This Guarantee shall be valid for a period of eight calendar months from the date hereof, computing for this purpose, the month in which this guarantee is executed by us (irrespective of the number of days of the month then remaining) as one calendar month and any demand hereunder to be valid shall be made not later than thirty days from the date of the expiry of the period of this Guarantee."

E According to evidence the demand was made on the respondents on June 17, 1975. It was therefore contended by them that the demand was made out of time. Learned counsel for the appellants argued that the time limit was null and void in view of section 29 of the Contracts Act, which reads:

F "Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

The learned judge held that Clause 13 of the guarantee agreement was not caught within the ambit of the provisions of section 29 of the Contracts Act. That in my opinion is a question of law. The true construction of a document is a question of law for the court, and it is no part of the court's function at this stage of the litigation to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

G In any event the learned judge found that *prima facie* there was an issue which should go for trial. He also found that the grounds relied upon by the respondents were sufficient grounds for setting aside the judgment in default.

I It is clear that the application to set aside the judgment in default was made under Order 13 rule 10 of the Rules of the Supreme Court. The rule provides:—

"Where judgment is entered pursuant to any of the preceding Rules of this Order, it shall be lawful for the court or a judge to set aside or vary such judgment upon such terms as may be just."